1986

State of Utah v. Julie Warren Verde : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, 20954 :

Plaintiff-Respondent, : Case No. 20954

-v- :

JULIE WARREN VERDE, : Category No. 2

Defendant-Appellant. :

BRIEF OF RESPONDENT

APPEAL FROM CONVICTION OF SALE OF A CHILD A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-7-203 (1982), IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE HOMER F. WILKINSON, JUDGE PRESIDING.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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-v-	:	
JULIE WARREN VERDE,	:	Priority No. 2
Defendant/Appellant.	:	

STATEMENT OF THE CASE

Defendant, Julie Warren Verde, was charged with sale of a child, a third degree felony, in violation of Utah Code Ann. § 76-7-203 (1978).

Defendant was convicted of a sale of a child, in a jury trial held June 5 and 6, 1985, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, Judge, presiding. Defendant was sentenced by Judge Wilkinson on September 5, 1985, to the indeterminate sentence of up to five years in prison and a $5,000.00 fine and placed on probation on condition she serve nine months in the county jail (90-day reduction if defendant paid $2,500.00 fine and performed 450 hours community service). On November 18, 1985, defendant's sentence was modified to a jail term of three months. The sentence has been stayed pending this appeal.

STATEMENT OF FACTS

The victim, Tammy Watson, first met the defendant, Julie Warren Verde, on June 25, 1984 when defendant came to see Dr. Ray Barton concerning treatment for weight reduction (Tr.

10). Mrs. Watson worked as a medical assistant in Dr. Barton's office (Tr. 9, 65) and was pregnant at the time (Tr. 12), but subsequently suffered a miscarriage on September 17, 1984 (Tr. 12).

From June, 1984 to January, 1985, defendant visited Dr. Barton's office weekly or bi-weekly and received injections of vitamin B-1 and phosphate (Tr. 18, 42-43, 61). The phosphate shots cost $6.00, and the vitamin B-1 shots cost $8.50 for a bi-weekly dose, $6.00 for a weekly dose (Tr. 15, 43, 73).

Four days after Mrs. Watson's miscarriage, the defendant came in for her check-up and shots (Tr. 12-13). She learned of Mrs. Watson's miscarriage and asked her if she was interested in a private adoption (Tr. 13, 68). Defendant told Mrs. Watson she worked for an attorney, and together they were setting up a practice for arranging adoptions (Tr. 13). She gave Mrs. Watson her phone number and asked her to call that evening (Tr. 13).

Mrs. Watson discussed the possibility of adopting with her husband that night and called defendant to tell her they were willing to adopt (Tr. 13-14). Defendant said she knew of a girl due to deliver in December, 1984 whose baby the Watsons would get for adoption (Tr. 14). Again she said she worked for an attorney and named him as Steve Kuhnhausen (Tr. 14). Defendant also told Mrs. Watson she would have to pay medical expenses and lawyer's fees of approximately $2,500.00 (Tr. 14-15). Defendant also indicated she would be receiving a portion of the legal fees for her work setting up the adoption (Tr. 15).

Through the period from September 21, 1984 to January 1985, the defendant and Mrs. Watson had almost nightly contact concerning the adoption (Tr. 18-19, 246), during which fees were discussed (Tr. 41). The defendant steadily increased the amount for fees (Tr. 42), from $2,500.00 in the beginning (Tr. 15, 41) to $3,000.00 (Tr. 40-41) and finally to $5,000.00 (Tr. 42, 101, 147). In October, defendant told Mrs. Watson that she would have to have some things to prepare for the arrival of the baby (Tr. 19, 25), which precipitated several purchases, including clothing, wallpaper, toys, a crib, and a car seat (Tr. 19, 22-26). Mrs. Watson also gave notice to her employer that she would be quitting when the baby came (Tr. 20).

Late in October, defendant said she would need to come to the Watson home for a "home study" to see if the Watson's were prepared for the child (Tr. 20). This home study was done sometime in November (Tr. 20), at which time, the defendant showed Mrs. Watson a photograph of a girl and boy and told her the girl was the mother of the baby they would be adopting (Tr. 21). Again, legal and medical fees were discussed. The figure was approximately $3,000.00 (Tr. 40-41).

Near the end of November, the defendant fabricated a letter (Tr. 223-224) which she represented to the victim was from "Sharon," the girl purportedly giving her child to the Watsons (Tr. 27). The defendant also told Mrs. Watson that Sharon had had an ultrasound test which indicated the baby was a girl (Tr. 30-31). This information perpetuated further purchases for the child (Tr. 31).

From October through January, Mrs. Watson agreed to and did in fact pay for defendant's injections in exchange for a reduction in legal fees for the adoption (Tr. 15, 43-44, 103-104, 170). The shots Mrs. Watson paid for totalled between $80.00 to $90.00 (Tr. 62).

On January 4, 1985, the defendant contacted Mr. Watson about another child, a 13-month old girl whose mother wanted to give her up for adoption (Tr. 47-49, 230). She told Mr. Watson the mother was in the hospital for drug abuse (Tr. 48), and brought the child, Emlee, to the Watson home for a "trial period" (Tr. 48). At the time, Emlee was sick (Tr. 49). Soon after, defendant called to see if Mrs. Watson wanted to adopt Emlee (Tr. 50). Mrs. Watson thereafter made several purchases for Emlee (Tr. 24, 33-38). At this point, Mrs. Watson and her family members believed they were getting both Emlee and a newborn to adopt (Tr. 137-38).

Defendant picked up Emlee on January 6th, saying her mother wanted to see her one last time (Tr. 51). Mrs. Watson became concerned when the defendant did not bring Emlee back. Finally, the defendant contacted Mrs. Watson and said the child was in the University of Utah Hospital for treatment and that she would be returned to the Watsons (Tr. 52-53).

On January 7th, Mrs. Watson met the defendant at defendant's request in a Fred Meyer parking lot (Tr. 53). At this time, defendant gave Emlee to Watson (Tr. 53) and asked her for gas money to pay for travel costs in delivering Emlee. Mrs. Watson gave her $5.00 (Tr. 53-54).

Defendant took Emlee again on January 13th, on the premise she was meeting with the judge and lawyers to finalize the adoption and to show them how Emlee's condition had improved (Tr. 56). She said the child would be returned to the Watsons to adopt on January 14th (Tr. 56) and to have $500.00 advance payment ready to cover the paperwork (Tr. 105).

When defendant did not return Emlee to Mrs. Watson on January 14th as planned, Mrs. Watson became concerned and talked with the defendant (Tr. 56). Mrs. Watson felt the defendant was making excuses for not delivering the baby to her (Tr. 56); so she checked on the represention defendant had made (Tr. 56, 57), and subsequently called the police (Tr. 56, 57, 144).

Detective Pat Smith and Sargeant Gale McCurdy came to Mrs. Watson's home to investigate the situation (Tr. 57, 144-45) and were also there listening on a speaker recorder attached to the phone during several of Mrs. Watson's conversations with defendant (Tr. 57, 146). After Mrs. Watson contacted the police, the parties had further contact concerning the Watsons' acquisition of Emlee (Tr. 58).

Sometime between January 14 and 22, defendant called Mrs. Watson and told her Emlee's mother had consented to the adoption (Tr. 58). Defendant made another call to Mrs. Watson on January 31st to arrange another meeting at 9:00 a.m. in the Fred Meyer parking lot (Tr. 59, 95). In a phone conversation at about this time, she told Mrs. Watson not to say anything about the $5,000.00 in fees (Tr. 101, 147).

Mrs. Watson, Mrs. Leonard and her grandaughter, met the defendant on February 1st as planned (Tr. 60). Sargeant McCurdy and Detective Smith observed the transaction between Watson and the defendant (Tr. 60, 149-150). Defendant gave Emlee to Mrs. Watson and told her Emlee was hers (Tr. 60). Mrs. Watson left the Fred Meyer parking lot and drove to Dr. Barton's office, where she met the police who took the child (Tr. 61).

As the defendant drove away, the two officers stopped her (Tr. 150) and questioned her as to who Emlee's mother was (Tr. 150-51). The defendant first gave the name of June McIntyre in Ogden (Tr. 150-52). The officers then read her the Miranda warning (Tr. 152-53). She subsequently gave them the correct name of the child's mother, June Burkhardt (Tr. 153), told them Emlee was not up for adoption (Tr. 153), and that she wanted to start an agency but had only talked to an attorney, Mr. Kuhnhausen, once (Tr. 153-54).

Defendant testified in her own defense. She denied quoting any specific amount for medical expenses (Tr. 248), but did admit she had quoted legal fees of $500.00 (Tr. 223) and discussed hospital expenses (Tr 104). She further claims she did not ask for money for adoption services (Tr. 104). During the months of October, 1984 through January, 1985, Mrs. Watson paid for defendant's vitamin B-1 injections (Tr. 98). Defendant claims there was no agreement Mrs. Watson would pay for these shots in exchange for a reduction in the legal fees (Tr. 240). She says Mrs. Watson told her the shots were "on the house." (Tr. 59.) However, Dr. Barton testified only he could authorize free treatment (Tr. 170).

Defendant further testified that Sharon, the girl allegedly placing her child with the Watsons, changed her mind (Tr. 223), and that she tried to find another girl willing to give up her child for adoption (Tr. 223-24). She called Lori Warner, her sister, as a witness to corroborate this testimony (Tr. 208-09).

Defendant stated that she asked Mrs. Watson to care for Emlee on January 4th because both Emlee's mother and she were too ill to care for her (Tr. 227). She further stated that she took Emlee back to Mrs. Watson on January 7th because Mrs. Burkhardt was still too sick to care for her herself (Tr. 230). Defendant admitted, however, that after she delivered Emlee to Mrs. Watson the second time, she told Mrs. Watson that Emlee was available for adoption (Tr. 230-31).

On February 1, defendant asked Mrs. Burkhardt if she could take Emlee to an abortion talk she was giving (Tr. 185-86, 265) which, by her own admission was a lie (Tr. 265). The defendant testified that on February 1st, she told Mrs. Watson she could have Emlee on a visitation basis and to have her back at 5:00 p.m. that day.

Defendant did not call any witnesses to corroborate her claim that the fees discussed were for legal and medical expenses.

SUMMARY OF ARGUMENT

Defendant's claim that the statutory exceptions were essential elements of the crime of sale of a child requiring a jury instruction is not supported by any authority or legal

analysis and was not adequately preserved below for review on appeal. Existing authority supports the State's position that exceptions and provisos are not essential elements of a crime. Therefore, it was not plain error for the court not to instruct concerning them.

The trial court properly admitted evidence of the victim's state of mind because it was relevant to establish the defendant's intent to sell a child for value. Defendant's claim that Mrs. Watson's out-of-court statements to Tania Leonard and Ronda Colvin was inadmissible hearsay was not preserved in the trial court below for appeal. The statements were not hearsay, as they were not offered for the truth of their content, but to establish the victim's state of mind. They were also admissible as non-hearsay under the prior consistent statements rule, Utah R. Evid. 801(d)(1)(B). Assuming they were hearsay, they would still be admissible under at least two exceptions to the hearsay rule, Utah R. Evid. 803(1) and (3).

Out-of-court statements made by representatives of the Utah State Hospital, Social Services and the children's center indicating defendant had made false representations to the victim, Mrs. Watson, were hearsay, but their admission was harmless error under the circumstances of this case, where the State offered the victim's testimony that she had found the defendant's representations false and defendant herself established the same facts in her testimony. Moreover, the defendant failed to object to these statements; therefore, she cannot challenge on these grounds on appeal. Defendant further

failed to show that the probative value of evidence of the victim's state of mind was substantially outweighed by its prejudice to the defendant.

Finally, the defendant failed to show that her defense counsel rendered a demonstrably deficient performance at trial.

ARGUMENT

POINT I

DEFENDANT WAIVED HER RIGHT TO CHALLENGE THE JURY INSTRUCTIONS ON APPEAL AND, NEVERTHELESS, WAS NOT ENTITLED TO AN INSTRUCTION REGARDING THE STATUTORY EXCEPTIONS TO THE CRIME OF SALE OF A CHILD, UTAH CODE ANN. § 76-7-203 (1978).

Defendant, for the first time on appeal, claims that the jury was not adequately instructed on the elements of the offense of sale of a child as outined in Utah Code Ann. § 76-7-203 (1978). That statute provides:

> Any person, while having custody, care, control or possession of any child, who sells, or disposes of, or attempts to sell or dispose of, any child for and in consideration of the payment of money or other thing of value is guilty of a felony in the third degree; provided, however, this section shall not make it unlawful for any person, agency or corporation to pay the actual and reasonable maternity, connected medical or hospital and necessary living expenses of the mother preceding and during confinement as an act of charity, so long as payment is not made for the purpose of inducing the mother, parent or legal guardian to place the child for adoption, consent to the adoption, or cooperate in the completion of the adoption.

(Emphasis added.) (See Addendum D.) The jury instructions defining the elements of the offense were as follows:

Instruction No. 12:

> Before you can convict the defendant, Julie Warren Verde, of the crime of Sale of a Child, a Felony of the Third Degree as

charged in the Information, you must find from the evidence, beyond a reasonable doubt, all of the following elements of the crime:

1. That on or about the 1st day of February, 1985, in Salt Lake County, State of Utah, the defendant, Julie Warren Verde, had custody, care, control or possession of any child; and

2. That the defendant:

a. sold or disposed of, or

b. attempted to sell or dispose of said child; and

3. That the defendant did so:

a. for and in consideration of the payment of money, or

b. for other thing of value; and

4. That the defendant committed such act intentionally or knowingly.

If you believe that the evidence establishes each and all of the essential elements of the offense beyond a reasonable doubt, it is your duty to convict the defendant. On the other hand, if the evidence has failed to so establish one or more of said elements then you should find the defendant not guilty.

Instruction No. 13:

Under the laws of the State of Utah, a person commits the crime of Sale of a Child when the actor has custody, care, control or possession of any child, and the actor sells or disposes of, or attempts to sell or dispose of said child, and the actor does so for and in consideration of the payment of money or other thing of value.

Instruction No. 14:

You are instructed that a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct

> constituting a substantial step toward commission of the offense.

(R. 49-51.) Defendant now claims that the court should have also instructed the jury that it is not illegal to pay medical, legal and other expenses necessarily connected with the birth and adoption, so long as such payment is not inducement for the adoption (citing the statutory exception in § 76-7-203 and Utah Code Annotated § 55-8a-1(4) (permitting payment for legal fees connected with adoptions)). (See Addendum D and G.) She claims the court's failure to so instruct was reversible error.

First, defense counsel at trial failed to submit an instruction concerning those exceptions and did not object to those instructions given at trial. When a party fails to make a proper and timely objection to an instruction, or to present a proper request to the court to correct any claimed deficiency, he is thereafter precluded from contending error on those grounds. State v. Noren, 704 P.2d 568, 570 (Utah 1985); State v. Kazda, 545 P.2d 190, 193 (Utah 1976). The purpose of this rule is to give the trial court an opportunity to correct or supply any inadequacy in the instructions so that the case can be decided on the proper basis. Defendant thus waived the issues for appellate review. Moreover, defendant has failed to support with any legal authority her claim that the exceptions to Section 76-7-203 are basic elements requiring a jury instruction. Therefore, this Court should not consider her challenge to the instructions on this ground on appeal. State v. Amicone, 689 P.2d 1341 (Utah 1984).

Defendant attempts to overcome her own procedural default and waiver by contending that the trial court's failure, on its own, to instruct the jury on the exceptions was plain error. Existing authority does not support defendant's position.[1] Utah Code Ann. § 76-1-501 (1978) provides:

> (1) A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt . . . .
>
> (2) As used in this part the words "elements of the offense" mean:
>
> > (a) The conduct, attendant circumstances, or results of conduct proscribed, prohibited or forbidden in the definition of the offense;
> >
> > (b) The culpable mental state required.

(See Addendum E.) Thus, the statutory definition of "elements of the offense" does not include acts acceptable under the Code, but only those "proscribed, prohibited or forbidden."

In essence, the defendant is asking this Court for a *per se* rule providing that exceptions be considered essential elements to any crime charged which must be disproved by the State beyond a reasonable doubt. Such a rule would require the prosecution to put on evidence negating all possible acceptable

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[1] Instructions to the jury in a criminal prosecution with regards to exceptions and provisos are discussed generally at 169 A.L.R. 315, 336-37 (1947) and 75 Am. Jur. 2d Trial § 714 (1974) (see Addendum A and B). These commentaries state there is authority which holds it is not necessary to include exceptions or provisos in the jury instructions defining the crime charged where they embrace mere matters of defense, where the evidence raises no issue as to the matter embraced in an exception or proviso, or where the instructions on the affirmative elements of the offense clearly negate the exception or proviso.

acts under any offense or any possible defense though not raised by the defendant. This would be unduly burdensome, prejudicial and confusing to the jury. To require the lower courts to instruct on every conceivable exception would be even more so. The court is only obligated to instruct on what constitutes a crime, State v. Roberts, 711 P.2d 235, 239 (Utah 1985), not what does not.

A per se rule such as the defendant proposes would be contrary to Utah case law. Where the evidence at trial raises no issue as to the matter embraced in the exception, the trial court need not include the exception in charging the jury as to the definition of the crime. Noren, 704 P.2d at 571; State v. McCardell, 652 P.2d 942, 945 (Utah 1982); State v. Pacheco, 27 Utah 2d 281, 282, 495 P.2d 808, 809 (1972). This principle is embodied in the law of affirmative defenses, which requires defendants to timely assert and plead any affirmative defenses. Only when this is done and the defense has introduced evidence to support an affirmative defense is the court required to instruct the jury on the affirmative defense asserted. See, Utah Code Ann. §§ 76-2-301 to 308 (1978 & Supp. 1986); 77-14-1 to 6 (1982 & Supp. 1986); 77-35-16(c)(d) (1982); State v. Harding, 635 P.2d 33, 34 (Utah 1981).

Further, in an instruction defining the crime charged, the court need not, of its own motion, include an exception which is merely a matter of defense. 75 Am. Jur. 2d Trial § 714 (1974); Thomas v. State, 330 N.E.2d 325, 328 (Ind. 1975), citing Gross v. State, 186 Ind. 581 N.E. 562, 564 (1917). In Gross, the

court held that the complained of instruction referred only to the definition of the offense, the charge pleaded, and the penalty the jury might assess in case of a conviction. "The exception noted in the proviso . . . is a matter of defense in a proper case, and being subsequent to the definition of a crime charged, it was not necessary, as a question of pleading to negative it . . . . This instruction was complete as to the subject covered, and no error intervened by the failure of the court, on its own motion, to include the proviso." The rationale to this rule is that such exceptions and provisos are merely definitional and do not constitute elements of the offense charged. Id. Defendant's reliance for an affirmative defense on Utah Code Ann. § 55-8a-1(4) (supp. 1986), which provides:

> No provision of [Chapter 55] precludes payment of fees for medical, legal, or other lawful services rendered in connection with the care of a mother, delivery and care of a child, or lawful adoption proceedings; nor may any provision of [Chapter 55] abrogate the right of procedures for independent adoption as provided by law[,]

is misplaced. (See Addendum G.) This section allows only for lawful services rendered on lawful adoption proceedings. Because the defendant was not licensed (Tr. 266), as required by § 55-8a-1(2) (Supp. 1986), her services were not lawful and she cannot avail herself of this defense.

Defendant in the instant case, failed to present any evidence to justify giving an instruction on her defenses. She failed to produce evidence of real doctor, hospital, or other fees in connection with maternity or confinement. She failed to call a doctor concerning actual medical services or a lawyer

concerning actual legal services rendered in connection with a legal adoption. The only evidence that the fee amounts mentioned were legal and medical in nature is defendant's and victim's testimony of what the defendant told the victim. In any event, she also told Watson some of the legal fees were to pay her for work she had done (Tr. 15). That defendant told Mrs. Watson and Mrs. Watson believed these fees to be for legal and medical expenses is irrelevant. To satisfy the exceptions defendant cites, there must be actual fees for lawful services actually rendered. Not only did defendant fail to meet her duty of going forward with evidence proving the fees were actual and lawful as a defense, Utah Code Ann. § 76-1-504 (1978), by her own admissions she negated those very defenses (Tr. 244, 262, 266-67).

Finally, defendant's case authority in Point II of her brief does not support her claim that failure to instruct on the exceptions was plain or reversible error. These cases involve alleged errors in instructing on acts which are prohibited, not those which are excepted. In each of the cases cited, plain or reversible error was predicated on inadequate or inaccurate instructions regarding the actual elements of the offense as elements are defined in § 76-1-501(2), supra (Addendum E). See, State v. Day, 572 P.2d 703 (Utah 1977) (no miscarriage of justice where court failed to define "community standards" and a requirement of the offense charged was to find defendant's conduct contrary to such community standards); State v. Lesley, 672 P.2d 79 (Utah 1983) (trial court erred, notwithstanding

appellant's failure to object to the jury instruction, where instruction misstated the intent necessary to commit criminal trespass); State v. Laine, 618 P.2d 33 (Utah 1980) (reversible error found where trial court's instructions failed to expressly include proper element of intent); State v. Jones, 657 P.2d 1263 (Utah 1982) (no reversible error where court refused to give separate instruction on requirement of victim's reliance in theft by deception case because instruction was given in statutory language, which included reliance); State v. Reedy, 681 P.2d 1251 (Utah 1984) (no reversible error where special identification instruction requested by defendant was fully covered by instructions given); Chambers v. People, 682 P.2d 1173 (Colo. 1984) (absent linkage of an instruction omitting statutory culpable mental state with joint operation instruction defining the culpable mental state, trial court committed plain error); People v. Ford, 60 Cal.2d 772, 36 Cal. Rptr. 620, 388 P.2d 892 (1964) (error in court's failure to give, on its own motion, an instruction on the essential element of intent was not prejudicial where defendant's testimony permitted of no other interpretation than that defendant entertained the specific intent to steal); State v. Doe, 100 N.M. 481, 672 P.2d 654 (1983) (the failure to give a definitional jury instruction is not error). In the instant case, the defendant claims error in failing to instruct only on acts legal and acceptable. While the defendant is entitled to an accurate jury instruction on all the basic elements of the offense, Roberts, 711 P.2d at 239, exceptions are not among them, Utah Code Ann. § 76-1-501, supra.

The burden of showing error is on the defendant, who seeks to upset the trial court's judgment. Noren, 704 P.2d at 571, quoting State v. Jones, 657 P.2d at 1267. Since she has failed to prove through record evidence that she was entitled to an instruction on the exceptions, this Court should assume regularity in the proceedings below and affirm the judgment.

POINT II

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF THE VICTIM'S STATE OF MIND.

Because the defendant charges in Point III of her brief that defense counsel rendered a deficient performance in failing to object to irrelevant, prejudicial and hearsay evidence, the State will address the relevancy and admissibility of that evidence in this Point. The State called six witnesses, including the victim, to testify concerning the victim's emotional condition during and immediately following the commission of the offense. Defendant asserts this evidence was inadmissible for several reasons. First, the victim's mental condition was irrelevant to prove the crime charged. Second, certain testimony was based on out-of-court statements and therefore inadmissible hearsay. And third, even if admissible, the probative value of the state-of-mind testimony was outweighed by its prejudicial and confusing effects; therefore, the trial court abused its discretion in allowing the testimony.

A. The Victim's State of Mind Was Relevant To Establish Defendant's Intent To Commit the Offense of Sale of a Child.

Defendant contends that the trial court abused its discretion under Utah R. Evid. 401, 402 and 403 by admitting (a)

the victim's and her mother's testimony concerning purchases made in anticipation of the adoption, (b) receipts as proof of these purchases, (c) Tania Leonard's testimony that the victim was emotionally upset after the incident, (d) Dr. Barton's testimony that the victim, his employee, was upset, depressed and had attempted suicide after the incident, and (e) out-of-court statements of several declarants. More specifically, she argues the admission of this evidence is irrelevant to establish that she "actually placed a child with the prosecutrix 'in consideration of the payment of money or other thing of value'" (D.B. 26).[2]

It must be noted at the outset that § 76-7-203, supra, does not require the State to prove that the defendant actually placed a child or received consideration. It need only prove that she attempted to place a child for value. Under this statute, the commission of or attempt to commit the offense are equal crimes.

> Rule 401 defines "relevant evidence" as:
>
> evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402 further provides that, except as otherwise provided, all relevant evidence is admissible, and irrelevant evidence is not.

While § 76-7-203 does not specify a culpable mental state in defining the offense of sale of a child, the state must

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[2] D.B. is used to cite to defendant's brief.

still prove mental culpability under Utah Code Ann. § 76-2-102 (Supp. 1986) (See Addendum C). The trier of fact may infer that a defendant intends the natural and probable consequences of his or her acts. State v. Caliguiri, 664 P.2d 466 (Wash. 1983); State v. Burton, 681 P.2d 646 (Kan. 1984). In addition, Utah law holds that intent may be inferred from the actions of the defendant or from the surrounding circumstances. State v. Murphy, 674 P.2d 1220, 1223 (Utah 1983).

In the present case, the defendant represented to Mrs. Watson that she worked for an attorney (Tr. 13, 14), that together they were setting up a practice for arranging adoptions (Tr. 13), and that she knew of a baby due in December, 1984 which the Watsons could adopt (Tr. 14). By her own admission, defendant fabricated a letter she represented to Mrs. Watson as being from "Sharon," the expectant mother (Tr. 223-24). Defendant also told Mrs. Watson that Emlee was available for adoption (Tr. 230) and delivered her to Mrs. Watson on three occasions (Tr. 47-49, 53), with the stated understanding that Emlee was to be the Watsons' child (Tr. 50, 53, 58, 60).

Watson's subjective belief that she was going to adopt a child with the defendant's aid, and her subsequent depression and suicide attempt after she found out that she could not adopt Emlee were the natural and probable consequences of defendant's representations and conduct. Mrs. Watson's state of mind, both during and after the incident, is probative of the fact that she had been told by defendant that she could adopt a child from defendant. This fact, in turn, is probative, when taken together

with the fact that defendant fabricated the letter and lied to the police about the identity of Emlee's mother, of the consequential fact that defendant intended to and did in fact dispose of the child in her care for value.

Defendant further attempts to distinguish the victim's depression and suicide attempt after February 1, 1985, by claiming it is irrelevant as not part of the *res gestae*. However, this Court has held:

> The crucial question in all cases is whether the statement was made while the declarant was still under the influence of the event to the extent that his statement could not be the result of fabrication, intervening actions, or the exercise of choice of judgment.

State v. McMillan, 588 P.2d 162, 163 (Utah 1978), *citing Johnston v. Ohio*, 76 Wash. 2d 398, 457 P.2d 194, 199 (1969); 22A C.J.S. *Criminal Law* § 671 (1961) (acts, conduct, declarations, statements made by the injured person after an offense are admissible as part of the *res gestae* when they were made at such time and place and under such circumstances as to exclude the possibility of design, premeditation of fabrication, and as to indicate they were spontaneous expressions of a state of mind *created by the act charged*). While Fed. R. Evid. 803(1), which was adopted verbatim in Utah R. Evid. 803(1), abandons the *res gestae* concept as unduly confusing and vague, *Hearsay*, 4 Weinstein's Evid. (MB) ¶ 803(1)[01] (1985), it adopts similar criteria under a continuity of event analysis. It is for the trial court to decide, in its discretion, whether a given statement or conduct falls within or without the reriod of

continuous mental process from the event. The standard of review is abuse of discretion. United States v. Ponticelli, 622 F.2d 985, 991 (9th Cir.), cert. denied, 449 U.S. 1016 (1980); State v. Rasmussen, 92 Utah 357, 68 P.2d 176, 178-79 (1937); State v. McClain, 706 P.2d 603, 604 (Utah 1985).

Under this analysis, the jury could reasonably have found that the victim's depression and attempted suicide were "spontaneous expressions of her state of mind created by the act defendant was charged with. The possibility that Watson feigned her depression and put her own life in peril to improve her position in a subsequent lawsuit is too remote to be considered.

B. The Victim's Out-Of-Court Statements Made During the Commission of the Offense Were Not Inadmissible Hearsay; Moreover, Any Admission of Hearsay Statements Was Harmless Error.

Defendant's claim that the victim's out-of-court statements were inadmissible as hearsay should be rejected for two reasons. First, her failure to object to their admission on this ground at trial precludes her raising it on appeal. Utah R. Evid. 103(a)(1); McCardell, 652 P.2d 942, 945 (Utah 1982). Second, assuming the issue could be reached, Judge Wilkinson properly found that Watson's out-of-court statements to witnesses Colvin and Leonard were admissible under Utah R. Evid. 801, 803(1), or 803(3). Rule 801 provides:

> The following definitions apply under this article:
>
> (c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

> (d) Statements which are not hearsay. A statement is not hearsay if
>
> (1) Prior statements by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with his testimony or the witness denies having made the statement or has forgotten, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; . . .

(Emphasis added.) This Court has been liberal in its interpretation of the applicable rule in the area of contemporaneous statements. State v. Sibert, 6 Utah 2d 198, 310 P.2d 388 (1957).

Tania Leonard's testimony that the victim said she was adopting a child through the defendant, that defendant had given her a letter from the expectant mother, and that defendant had given Emlee to her to adopt is non-hearsay since these statements were not offered to prove the truth of their content, but to show the victim believed she was going to adopt a child through the defendant. Utah R. Evid. 801(c).

This testimony, as well as Ronda Colvin's testimony that the victim explained to her she was paying for the shots in exchange for a reduction in legal fees, was also admissible as non-hearsay under Utah R. Evid. 801(d)(1)(B) as evidence of Mrs. Watson's prior consistent statements. The rule provides that a statement is not hearsay if the declarant testifies at trial, is subject to cross-examination concerning the statement, and the statement is consistent with her testimony and offered to rebut

an express or implied charge against her of recent fabrication or improper influence or motive.

There has been suggestion in several recent federal cases that Rule 801(d)(1)(B) also applies "[w]here the judge construes a line of questioning to be directed towards impugning the memory of the witness." In these instances, "he will allow a consistent statement made when the event was recent and memory fresh to be received in support." United States v. Keller, 145 F. Supp. 692, 697 (D.N.J. 1956). See also, United States v. Coleman, 631 F.2d 908, 914 (D.C. Cir. 1980); United v. Herring, 582 F.2d 535 541 (10th Cir. 1978); United States v. Majors, 584 F.2d 110 (5th Cir. 1978).

Watson was the first witness called at trial and was heavily cross-examined. The defense implied that Mrs. Watson, through her previous attempts to adopt, should have known that defendant could not provide a child as she had represented (Tr. 76). The defense also implied that Watson had recently fabricated her explanation of the incident by suggesting she had other motives for the purchase of children's clothing, that her purchases were gratuitous and not perpetuated by the promised adoption (Tr. 74, 80, 83, 88), and that defendant had told her Emlee was not adoptable (Tr. 86). Mrs. Watson was further impeached during cross-examination by the implication that defendant had not told Mrs. Watson she was working for an agency (Tr. 76), that during the preliminary hearing she had said nothing about a steady increase in fees (Tr. 82), that her testimony that defendant contacted her at home beginning in

September was false (Tr. 83), and that she did not pay for the shots (Tr. 85, 98), particularly in exchange for reduced legal fees (Tr. 103-04). Watson's prior statements to Colvin and Leonard, which were consistent with her testimony at trial, were admissible to rehabilitate and corroborate her testimony in this regard. State v. Speer, No. 20418, slip op. at 3-4 (Utah Sup. Ct., May 1, 1986); State v. Middleton, 294 Or. 427, 657 P.2d 1215, 1217 (1983).

Even if Watson's out-of-court statements to Colvin and Leonard were somehow viewed as hearsay, they would still be admissible under at least two exceptions to the hearsay rule, Utah R. Evid. 803(1) and (3). Rule 803(1) establishes the following exception:

> A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

Rule 803(3) excepts:

> [a] statement of declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) . . .

Because Rule 803(3) is essentially a specialized application of Rule 803(1) Fed. R. Evid. 803 advisory committee notes, much of the justification for one applies to the other. As pointed out in Point II.A., the crucial question is whether the statement was made while the declarant was still under the influence of the event to the extent his statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment. McMillan, 588 P.2d at 163. The trial

court decides, in its discretion, whether a statement or conduct falls within the continuous mental process from the event. The standard of review is abuse of discretion. Ponticelli, 622 F.2d at 991; Rasmussen, 92 Utah 357, 68 P.2d at 178-79; McClain, 706 P.2d at 604.

Mrs. Watson's out-of-court statements were made contemporaneous to and while she was under the influence of the purported adoption arrangement. Moreover, they describe the conduct of the defendant. Therefore, Mrs. Watson's statements were admissible under Rule 803(1). Moreover, Watson's statements at that time are the best evidence of her intent and plan to obtain a child through the defendant; thus admissible hearsay under Rule 801(3).

Because defendant did not object to Leonard's testimony that Social Services told her defendant did not work for them and that the children's center said they did not have a child named Emlee, or Detective Smith's testimony that the Utah State Hospital told him there was no patient there under name the defendant had given as Emlee's mother, defendant cannot now challenge their admission on appeal. Utah R. Evid. 103(a)(1); McCardell, supra. Also, defendant may not claim error because no substantial right of defendant was affected by the admission of this testimony as required by Rule 103(a), supra. The admission of this testimony concerning defendant's representations was merely cumulative.

Defendant herself testified that the child was with her mother and therefore not in a children's center or foster home

during the times Mrs. Watson did not have her (Tr. 229-30). She admitted she did not work for any adoption agency or lawyer concerning arranging adoptions (Tr. 266). June Burkhardt testified that she was not hospitalized for her illness in January, 1985. The victim, Mrs. Watson, also testified that she had become suspicious, checked on the defendant's representations, and found them to be false (Tr. 56-57). Thus, very little hearsay evidence regarding the defendant's fabrications was brought out by Leonard and Smith alone. Because exlusion of Leonard's and Smith's hearsay statements would not present a reasonable likelihood of a different result, any error in the admission of such testimony is harmless. See In Re Estate of Hock, 655 P.2d 1111 (Utah 1982) (improper admission of hearsay evidence was harmless error because exclusion thereof would not present likelihood of different result); State v. Gardunio, 652 P.2d 1342 (Utah 1982) (admission of hearsay evidence connecting defendant with crime not prejudicial where prior testimony also connected defendant to same conduct connecting defendant to the crime).

C. The Probative Force of the Victim's State of Mind Far Outweighs Any Prejudice or Confusion It May Have Caused; Alternatively, Defendant's Failure to Object Under Utah R. Evid. 403 Bars Review of the Claim on Appeal.

Defendant asserts that, assuming the state of mind testimony was otherwise proper, it should have been excluded by the trial court because its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Utah R. Evid. 403. She

specifically objects to Watson's and Jackson's testimony concerning purchases and Dr. Barton's testimony about Watson's suicide attempt. The advisory committee notes to Fed. R. Evid. 403, which Utah has adopted almost verbatim, call for balancing the probative value of the need for the particular evidence against the harm likely to result from its admission.

> The appellate court's power of review is relatively limited. The test it is forced to apply, since it was not present at trial, will normally require it to assume the maximum probative force a reasonable jury might assess and the minimum prejudice to be reasonably expected.

Relevancy and Its Limits, 1 Weinstein's Evid. (MB) ¶ 401[01] (1985). Texas Eastern Transmission v. Main Office, Etc., 579 F.2d 561 (10th Cir. 1978); F & S Offshore, Inc. v. K.O. Steel Castings, Inc., 662 F.2d 1104, 1101-08 (5th Cir. 1981).

Respondent has already shown in Points I.A. and B., supra, that the evidence was highly relevant and probative. The state must prove beyond a reasonable doubt that the offense occurred. Without evidence of the victim's state of mind, there would be little if no evidence of defendant's culpable mental state or conduct. Furthermore, a defendant is not left helpless. She may vigorously cross-examine the State's witnesses, call her own to vouch for her good character, impeach the credibility of the complainant and the State's witnesses, and disclose any weaknesses in expert opinion testimony. Defendant was given full opportunity to present evidence of this nature in this case. Thus, defendant has failed to establish that the probativeness of the testimony was "substantially outweighed" by prejudice to her.

Moreover, defendant did not raise any objection to the testimony under Rule 403, except that of Dr. Barton. She is therefore precluded from challenging on this ground for the first time on appeal. Utah R. Evid. 103(a)(1); State v. Mitchell, 671 P.2d 213, 214 (Utah 1983). As to Barton's testimony, the objection was based solely on the ground there was no "materiality" after February 1, 1985, when defendant was arrested (Tr. 256). Under State v. Davis, 689 P.2d 5 (Utah 1984), the defendant must have specifically stated to the trial court the same grounds for objection to evidence she presents on appeal. Because the defendant did not specifically state prejudice and confusion as grounds for objection to the trial court, this Court should not address it.

This Court "will not interfere with the trial court's ruling on evidentiary matters unless it clearly appears that the court so abused its discretion that there is a likelihood that injustice resulted." McClain, 706 P.2d at 604, citing State v. McCardell, supra, and State v. Danker, 599 P.2d 518 (Utah 1979).

POINT III

THE EVIDENCE PRESENTED BY THE STATE WAS SUFFICIENT TO SUPPORT THE JURY'S VERDICT FINDING THE DEFENDANT GUILTY OF SALE OF OF A CHILD, UTAH CODE ANN. § 76-7-203.

Defendant asserts the evidence was insufficient to support the jury's verdict of guilt. The pertinent elements of the offense under the facts of this case are set forth in Utah Code Ann. § 76-7-203 (1978) as follows:

> Any person, while having custody, care, control or possession of any child, who sells, or disposes of, or attempts to

> sell or dispose of, any child for and in consideration of the payment of money or other thing of value is guilty of a felony of the third degree; . . .

Note that the above section punishes an attempt to sell a child equally with the completed act. Utah's attempt statute, Utah Code Ann. § 76-4-101 (1982), provides:

> (1) For purposes of this part a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense.
>
> (2) For purposes of this part, conduct does not constitute a substantial step unless it is strongly corroborative of the actor's intent to commit the offense.

Although the "substantial step" standard of § 76-4-101 is "for purposes of this part" of the code, there is no logical reason the "substantial step" test should not be applied to specific attempt offenses found elsewhere in the code. The analysis ought to be the same.

This Court has stated that § 76-4-101 adopts the definition of an "attempt" employed in the Model Penal Code, § 5.01, "purposed on drawing the line further away from the final act and enlarging the common law concept" which required intent and an act lending but failing to accomplish the crime. State v. Pearson, 680 P.2d 405, 408 (Utah 1984). The statute emphasizes what the accused has done, not what is left to be completed. Id. "Substantial step" means any conduct, whether act, omission or possession, which strongly corroborates the firmness of the actor's purpose to complete the commission of the crime. People

v. Frysig, 628 P.2d 1004 (Colo. 1981). This standard properly directs attention to overt acts of the accused which demonstrate convincingly a firm purpose to commit a crime, while allowing police intervention, based upon information or observation of such incriminating conduct, in order to prevent the crime when the criminal intent becomes apparent. State v. Workman, 90 Wash. 2d 443, 584 P.2d 382 (1978), quoting State v. Woods, 48 Ohio St.2d 127, 132 357 N.E. 2d 1059, 1063 (1979). The question of whether a step is "substantial" under the particular facts of the case is clearly for the fact-finder. McCardell, supra; Workman, 584 P.2d at 386. In the present case, the jury was instructed on both the commission and attempt theories, Jury Instruction Nos. 12, 13 and 14, supra (R. 49-51), indicating the court believed the standard appropriate for this specific attempt offense.

Applying the above statutory elements to the facts of this case, the evidence is sufficient to support defendant's conviction. The record evidence establishes that defendant had care, control and possession of Emlee Burkhardt, a child, on several occasions, and that on those occasions she variously represented to Mrs. Watson that she could have the child for a trial period, that the child was available for adoption, and that the baby was now hers (Tr. 48, 53, 58, 60, 230-31). The sole contention by defendant on appeal is that the State failed to establish that she attempted to sell or dispose of a child in consideration of the payment of money or other thing of value. Yet, she concedes that after she discussed the subject of arrarging an adoption with Mrs. Watson, she did not pay for her

own medical bills for diet shots (Tr. 240). She also concedes that, on one occasion when she delivered Emlee to Mrs. Watson, she asked Mrs. Watson for gas money, and Mrs. Watson gave her $5.00 (Tr. 53-54). However, she contends that the State did not prove these exchanges were in consideration for the purchase of a child. In other words, she claims these expenses were not sufficiently "linked" to the purchase of the child.

Consideration for money or other thing of value is a question of fact for the jury. Whether it was appropriate for the jury to reasonably infer that these exchanges of money or things of value were, in fact, in consideration of the sale of a child are determined from all of the facts and circumstances of this case.

The defendant made several representations and committed several acts which were substantial steps towards the commission of the crime of sale of a child. Defendant approached Mrs. Watson about the possibility of adopting a child (Tr. 13, 68). She suggested dollar amounts for legal and medical fees (Tr. 14-15, 40-41), yet never produced any evidence or testimony from a lawyer, doctor or mother concerning actual legal or medical expenses legitimizing these fees. Defendant further said that her work and the lawyer's work would cost $500.00 (Tr. 14, 71).

Defendant received $80.00 to $90.00 worth of diet shots, which the victim, Mrs. Watson, paid for (Tr. 166), in exchange for a reduction in the supposed legal fees (Tr. 15, 43-44, 103-04). This shows the defendant was attempting to receive

and was personally receiving consideration, even though the victim thought the payments were to reduce legal fees. The defendant's version that the shots were "on the house" is incredible. It hardly seems likely that Mrs. Watson would pay for a patient's shots without expecting something in return. Nor does it seem likely Dr. Barton would single out the defendant for gratuitous treatment ("on the house") over all his other patients (Tr. 170).

Defendant brought Emlee to the Watson home for a trial period (Tr. 48), told her Emlee was available for adoption (Tr. 47-49, 230), and asked Mrs. Watson if she wanted to adopt Emlee (Tr. 50). She also told Mrs. Watson to treat Emlee as her own (Tr. 41). The defendant subsequently took Emlee back and redelivered her twice. Prior to the original delivery date of January 14th, the defendant asked Mrs. Watson to have $500.00 advance payment ready to cover paperwork (Tr. 105). She also received $5.00 direct consideration on January 7th for having to deliver the child (Tr. 53-54). This was clearly not for legal or medical fees. When defendant made the last delivery on February 1st, she told the victim the child was hers (Tr. 60-61, 128). She further indicated she would "be in touch" with Mrs. Watson (Tr. 61).

Defendant contends that it was unreasonable for the jury to believe $85.00 to $95.00 would buy a child. But this Court should note that Mrs. Watson was still paying for the defendant's diet shots up to the defendant's arrest (Tr. 61-62). This arrangement was continuous from October to January. It is

possible these shot payments were to continue indefinitely. These amounts also could have been merely the down payment. Defendant had mentioned fees of between $2,500.00 to $5,000.00. Because she further stated on February 1st that she would be in touch with Mrs. Watson, it is reasonable to infer that she intended to collect the balance of these fees at some future date. While Mrs. Watson may have believed these were to be for medical and legal fees as discussed above, defendant offered no evidence to prove they actually existed. The jury could also reasonably have inferred that these exchanges and fees discussed were and would be received by the defendant in consideration for the sale of the child.

Defendant also contends that it was unreasonable for the jury to believe defendant would sell her best friend's child when the child's mother knew the defendant had taken her on February 1st. However, the offense occurred on January 4, 1985, when the defendant first delivered Emlee to Mrs. Watson with the representation Mrs. Watson could adopt Emlee. The State called Mrs. Burkhardt, who testified that at that time she did not really know where Emlee was (Tr. 189-90, 197). She testified she was very ill (Tr. 194-95, 198) and trusted the defendant to care for her children because she had nowhere else to go (Tr. 197). It is possible Mrs. Burkhardt, finding herself very sick, asked the defendant to help her find someone to take her children. Her testimony is full of uncertainties about dates, places and people. It is therefore also possible defendant was taking advantage of Mrs. Burkhardt's disorientation and sickness to sell Emlee and pass the blame to someone else.

The defendant intimates that Mrs. Watson's suspicions should have been arouseed when she got a 13-month-old child instead of a newborn. However, there is evidence in the record to show that the Watson family believed they were getting both children to adopt. Defendant told Mrs. Watson's mother that Mrs. Watson was still going to get the newborn baby (Tr. 137). She further told Mrs. Watson she should get two car seats, one for Emlee and one for the baby (Tr. 138).

All of the above facts indicate substantial steps strongly corroborating defendant's intent to sell a child for money and other things of value. Point II, supra, demonstrates there was substantial evidence the defendant had the requisite intent to commit the offense of sale of a child. Therefore, there was sufficient evidence to prove actual commission and attempt, equivalent crimes under the statute.

As pointed out in State v. Booker, 709 P.2d 342, 345 (Utah 1985), where a defendant claims the evidence was insufficient to sustain his conviction, the standard of review is narrow.

> "[W]e review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury. We reverse a jury conviction only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." State v. Petree, Utah, 659 P.2d 442, 444 (1983); accord, State v. McCardell, Utah, 652 P.2d 942, 945 (1982). In reviewing the conviction, we do not substitute our judgment for that of the jury. "It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses . . . ."

> State v. Lamm, Utah 606 P.2d 229, 231 (1980); accord, State v. Linden, Utah, 657 P.2d 1364, 1366 (1983). So long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops.

(Emphasis added.)

POINT IV

DEFENDANT HAS FAILED TO MEET HER BURDEN OF SHOWING INEFFECTIVE ASSISTANCE OF COUNSEL DENIED HER A FAIR TRIAL.

This Court recently held that, in order to challenge a conviction on the basis of ineffective assistance of counsel, "it is the defendant's burden to show: (1) that her counsel rendered a deficient performance in some demonstrable manner, and (2) that, but for counsel's error, the outcome of the trial would probably have been different. Codianna v. Morris, Utah, 660 P.2d 1101 (1983). See also, United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); Strickland v. Washington, 466 U.S. 668 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)." State v. Geary, 707 P.2d 645 646 (Utah 1985).

Defendant claims three general errors to demonstrate defense counsel's deficient performance: the failure to object to jury instructions omitting the exceptions and to request an instruction including them as elements; second, the admission without object of irrelevant and prejudicial evidence; and finally, the admission without objection of hearsay statements.

There is no evidence in the record to show defense counsel rendered a demonstrably deficient performance. As demonstrated in Point I, supra, defendant was not entitled to a jury instruction on the exceptions because the law did not

require it and the evidence in this case did not justify it. Therefore, defense counsel acted properly in not requesting instructions or objecting to the instructions in this regard.

Further, Point II.A., supra, shows that the complained of testimony was evidence of the victim's state of mind, and that her state of mind was relevant to establish the requisite conduct and culpability required under Utah Code Ann. § 76-2-102 (Supp. 1986) (Addendum C). The probative force of this testimony outweighed any possibility of prejudice or confusion. Point II. B., supra.

The State demonstrates in Point II.C. that the testimony defendant claims is inadmissible hearsay is, in fact, either nonhearsay or within an exception to the hearsay rule. Therefore, because this evidence was relevant, nonhearsay or excepted hearsay, any objections by defense counsel would have been futile. Failure to make motions or objections futile if raised is not ineffective assistance of counsel. Codianna v. Morris, 660 P.2d 1101, 1109 (Utah 1983).

Since there was no deficient performance or error by defense counsel, it is improbable that the jury's verdict would have been different. Consequently, the defendant fails to meet the two-pronged test of Geary, supra, to establish ineffective assistance of counsel.

CONCLUSION

Because defendant was not entitled to an instruction on the exceptions to the offense charged, defendant waived his right to challenge the admissibility of evidence proven to be relevant

and admissible, and there was sufficient evidence to support the jury's finding of consideration for money or other thing of value in exchange for a child, the State urges this Court to affirm defendant's conviction for violation of Utah Code Ann. § 76-7-203 (19788), sale of a child.

RESPECTFULLY SUBMITTED this 31st day of July, 1986.

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Attorney General

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MAILING CERTIFICATE

I hereby certify that I mailed four true and exact copies of the foregoing brief of respondent to Robert Van Sciver and Margo L. James, attorneys for appellant, 321 South 600 East, Salt Lake City, Utah 84102, postage prepaid, this 1st day of ~~July,~~ August 1986.

Earl F. Dorius

ADDENDUM A

Annot., 169 A.L.R. 315, 336-37 (1947)

2. Exceptions and provisos

Questions sometimes arise, in connection with the employment of statutory language in defining or explaining the offense charged to the jury, of the necessity of referring to exceptions or provisos contained in the statute. In this connection there is authority to support the conclusions that where an exception or proviso embraces mere matters of defense, where the evidence in the case raises no issue as to the matter embraced in an exception or proviso, or where the instruction on the affirmative elements of the offense clearly involves the negation of the exception or proviso, it is not necessary to include the exception or proviso in charging the jury, by the use of the statutory language, as to the definition of the crime.

In Gross v. State (1917) 186 Ind 581, 117 NE 562, 1 ALR 1151, a prosecution for drawing a dangerous weapon on another person, the court, in overruling the contention that an instruction given by the trial judge was erroneous for failing to include a proviso which was part of the statutory section defining the offense charged, said: "This instruction refers only to the definition of the offense, the charge pleaded, and the penalty the jury might assess in case of a conviction. The first count upon which appellant was convicted is based upon § 2344, Burns 1914, Acts 1905, pp 584, 687. The exception noted in the proviso of that section is a matter of defense in a proper case, and being subsequent to the definition of the crime charged, it was not necessary, as a question of pleading, to negative it. . . . This instruction was complete as to the subject covered, and no error intervened by the failure of the court, on its own motion, to include the proviso."

In Holmes v. State (1908) 82 Neb 406, 118 NW 99, a prosecution under a statute providing that if any clerk, agent, attorney at law, etc., "of any private person or any copartnership, except apprentices and persons within the age of eighteen years," should convert money of such person to his own use, he was guilty of an offense, it was contended by defendant that the trial judge, in defining the offense, failed properly to charge the exception in the court held that since the instructions clearly indicated that defendant was an attorney, and since applicable statutes prohibited any person under twenty-one years of age from being an attorney, the language in the charge which covered the affirmative part of the statute necessarily involved the negation of the exception, and the instruction was consequently no ground for reversal of the conviction.

Where defendant was prosecuted for rape under a statute setting forth the offense of carnal knowledge of a female child under the age of sixteen years and containing a proviso that if the jury should find that the alleged victim was not of good repute and the intercourse was with her consent, defendant should be acquitted of rape and convicted of fornication only, it was held in Com. v. Stewart (1933) 110 Pa Super Ct 279, 168 A 528, that since there was no proper testimony that the victim in the present case was of bad repute, there was no occasion for the court to read the proviso to the jury, and error could not be based upon the circumstance that in charging the jury the trial judge read only the affirmative portion of the enactment and did not read the proviso. "Had defendant attempted to establish, in a proper manner," the court added, "the bad repute of the girl as part of his defense, then it would have become the duty of the court to read the proviso."

ADDENDUM B

75 Am. Jur. 2d Trial § 714 (1974)

§ 714. Instructing in language of statute.

In charging as to the elements of the crime, the court may use the language of the statute violated,[60] and may indeed, quote the statute itself,[61] except for inapplicable parts.[62] So too, where the crime charged is defined in one subdivision of a statute, it is error to read to the jury the other subdivisions defining unrelated crimes.[63] But the failure to eliminate the inapplicable portions of the definition is not ground for reversal where no prejudice results therefrom,[64] or where, reading the charge as a whole, the instruction upon the subject of the offense is limited to the allegations of the indictment or information.[65] While, as has been indicated, it is proper ot employ the precise language of a controlling statute in defining the offense charged, it is not necessary to do so, and a failure to do it will not be regarded as erroneous if all the elements of the offense are correctly set forth in the language of the judge.[66]

In an instruction defining the crime charged, the court need not of its own motion include a statutory exception which is merely a matter of defense.[67]

ADDENDUM C

Utah Code Ann. § 76-2-102 (Supp. 1986)

76-2-102. Culpable mental state required — Strict liability.

Every offense not involving strict liability shall require a culpable mental state, and when the definition of the offense does not specify a culpable mental state and the offense does not involve strict liability, intent, knowledge, or recklessness shall suffice to establish criminal responsibility. An offense shall involve strict liability if the statute defining the offense clearly indicates a legislative purpose to impose criminal responsibility for commission of the conduct prohibited by the statute without requiring proof of any culpable mental state.

ADDENDUM D

Utah Code Ann. § 76-7-203 (1978)

76-7-203. Sale of child.—Any person, while having custody, care, control, or possession of any child, who sells, or disposes of, or attempts to sell or dispose of, any child for and in consideration of the payment of money or other thing of value is guilty of a felony of the third degree; provided, however, this section shall not make it unlawful for any person, agency, or corporation to pay the actual and reasonable maternity, connected medical or hospital and necessary living expenses of the mother preceding and during confinement as an act of charity, so long as payment is not made for the purpose of inducing the mother, parent, or legal guardian to place the child for adoption, consent to the adoption, or co-operate in the completion of the adoption.

ADDENDUM E

Utah Code Ann. § 76-1-501, 502 and 504

76-1-501. Presumption of innocence—"Element of the offense" defined.—(1) A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In absence of such proof, the defendant shall be acquitted.

(2) As used in this part the words "element of the offense" mean:

(a) The conduct, attendant circumstances, or results of conduct proscribed, prohibited, or forbidden in the definition of the offense;

(b) The culpable mental state required.

(3) The existence of jurisdiction and venue are not elements of the offense but shall be established by a preponderance of the evidence.

76-1-502. Negating defense by allegation or proof—When not required.—Section 76-1-501 does not require negating a defense:

(1) By allegation in an information, indictment, or other charge; or

(2) By proof, unless:

(a) The defense is in issue in the case as a result of evidence presented at trial, either by the prosecution or the defense; or

(b) The defense is an affirmative defense, and the defendant has presented evidence of such affirmative defense.

76-1-504. Affirmative defense presented by defendant.—Evidence of an affirmative defense as defined by this code or other statutes shall be presented by the defendant.

ADDENDUM F

Utah Code Ann. § 76-4-101 (1978)

76-4-101. Attempt—Elements of offense.—(1) For purposes of this part a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense.

(2) For purposes of this part, conduct does not constitute a substantial step unless it is strongly corroborative of the actor's intent to commit the offense.

ADDENDUM G

Utah Code Ann. § 55-8a-1 (1974)

55-8a-1. "Child placing" defined—License requirement—Limitations on unlicensed individuals—Commencement of action for violation.—(1) For purposes of this act, child placing is the receiving, acceptance or providing custody or care for any child under eighteen years, temporarily or permanently, for the purpose of finding a person to adopt such child or placing the child temporarily or permanently in a home for adoption or foster home placement.

(2) No person, agency, firm, corporation or association, or group children homes shall engage in child placing, or solicit money or other assistance for child placing, without having a valid written license from the division of family services.

(3) An attorney, physician or other person may assist a parent in identifying or locating a person interested in the adoption of a child of the parent, or assist a person in identifying or locating a child to be adopted; provided that no payment, charge, fee, reimbursement of expense, or exchange of value of any kind, or promise or agreement to make the same, may be made for any assistance. No attorney, physician or any other person shall issue or cause to be issued any card, sign or device to any person, or cause, permit or allow any sign or marking on or in any building or structure, or announce or cause, permit or allow any announcement to appear, in any newspaper, magazine, directory, or on radio or television or advertise by any other means that the attorney, physician or other person is available to provide assistance.

(4) No provision of this act shall preclude payment of fees for medical, legal, or other lawful services rendered in connection with the care of a mother, delivery and care of a child, or lawful adoption proceedings; nor shall any provision of this act abrogate the right of procedures for independent adoption as provided by law.

(5) The division of family services or any interested person may commence an action in the district court to enjoin any person, agency, firm, corporation or association violating subsections (2) or (3) of this section.